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硕 士 学 位 论 文

国际投资协定中的
“根本安全利益”条款研究

Research on the “Essential Security Interests” Clause
in International Investment Agreements

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内容摘要

“根本安全利益”条款是国际投资协定中最重要的条款之一。ICSID 仲裁庭对阿根廷相关问题的裁决，以及近几年全球经济危机的影响，使得这一问题成为国际投资法学界关注的焦点问题。而中国在投资领域由一个主要投资输入国变成一个兼具投资输入和输出双重身份的国家的国家的新发展，使中国在投资协定的谈判中面临新的挑战。本文以平衡利益原则为导向，立足于国际投资协定的已有规定及判例、学说，对“根本安全利益”中的争议问题，包括在“经济危机”中对这一条款的适用问题进行讨论，并提出建立中国双边投资条约范本的建议。

除引言与结语，本文共分三章。

第一章介绍“根本安全利益”条款的概况，包括该条款的发展及相关术语的使用；并介绍引起“根本安全利益”条款争议的阿根廷经济危机，以及这一争议为国际投资协定带来的平衡难题；此外，简要分析在阿根廷系列仲裁案件中适用双边投资条约及习惯国际法的关系，为下文的讨论奠定基础。

第二章从条款规定、判例、学说以及国际投资协定的主旨及发展趋势等方面对“根本安全利益”条款涉及的主要争议问题进行分析与评价，包括该条款在经济危机中的适用及措施的必要性、“自裁决”性质及可补偿性三个问题。

第三章结合对我国的国际投资协定及“根本安全利益”条款规定的现状分析，在前文研究的基础上，试为完善中国国际投资协定的“根本安全利益”条款提出建议，包括将该条款规定为“自裁决”性质，明确纳入经济危机事项，以及明确规定必要性与可补偿性内容等。

关键词：根本安全利益；投资协定；经济危机

ABSTRACT

The “essential security interests” clause is one of the most important clauses in international investment agreements (IIA). It was brought in focus in the area of international investment law in recent years due to the ICSID tribunals’ different decisions on a series of cases against Argentina, as well as the impact of global economic crisis. However, China is facing new challenges in its international investment negotiations as it transforms from a main capital importer into both capital importer and exporter. Based on the existing rules, cases and relevant theories, considering the principle of interest balance, this dissertation discusses the controversial issues of the “essential security interests” clause including the problems related to situations of “economic crisis”, and makes further suggestions to improve the Sino-foreign Model Bilateral Investment Treaty (BIT).

This dissertation is divided into three chapters apart from Preface and Conclusion.

Chapter One is a general introduction of the “essential security interests” clause. Firstly, it introduces the evolution and the use of related terms. Secondly, it describes the economic crisis in Argentina which brought about the disputes of the clause, and the balancing problems in international investment negotiations it brought. In addition, it briefly analyses the relationship between BIT and customary international law that tribunals applied in the Argentina cases for further discussions.

Chapter Two analyses and evaluates the controversial issues of “essential security interests” clause from aspects of the rules, cases, theories, the purpose and trend of the IIAs. It covers three issues including: the adaption and its necessity of the clause in situation of economic crisis, the nature of the “self-judging”, and its compensability.

Based on the analysis of current situations of Chinese IIAs and the “essential security interests” clause in China, Chapter Three makes suggestions for the improvement of this clause in Sino-foreign investment agreements. The suggestions are as follows: firstly, the clause should be defined as “self-judging”; secondly, specify the scope the “essential security interests”, and explicitly contained the

“economic crises” in the clause; thirdly, a reasonable criteria of the necessity should be clearly formulated; last but not the least, provide the rules of compensations.

Key words: essential security interests; investment agreement; economic crisis.

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缩略语表 (Abbreviations)

ICSID	International Centre for Settlement of Investment Disputes 解决投资争端国际中心
OECD	Organization for Economic Cooperation and Development 经济合作和发展组织
UNCTAD	United Nations Conference on Trade and Development 联合国贸易和发展会议
I.C.J.	International Court of Justice 国际法院
IIA	international investment agreement 国际投资协定
BIT	Bilateral Investment Treaty 双边投资条约
FCN	Treaty of Friendship, Commerce and Navigation 友好通商航海条约
FTA	Free Trade Agreement 自由贸易协定
GATT	General Agreement on Tariffs and Trade 关税及贸易总协定
WTO	World Trade Organization 世界贸易组织
ECHR	European Court of Human Rights 欧洲人权法院
U.N.T.S.	United Nations Treaty Series 联合国条约汇编
para./paras.	paragraph/ paragraphs
v.	versus
Art.	Article or Articles

案例表 (Table of Cases)

Short Title	Full Case Title and Citation
CMS v. Argentine	CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No.ARB/01/8.
LG&E v. Argentine	LG&E Energy Corp. / LG&E Capital Corp. / LG&E International Inc. v. Argentine Republic, ICSID Case No.ARB/02/1.
Sempra v. Argentine	Sempra Energy International v. Argentine Republic, ICSID Case No.ARB/02/16.
Enron v. Argentine	Enron Co. v. Argentine Republic, ICSID Case No. ARB/01/3.
Continental Casualty v. Argentine	Continental Casualty Co. v. Argentine Republic, ICSID Case No.ARB/03/9A.
Nicaragua v. U.S.	Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, 1986 I.C.J. 14.
Gabcíkovo-Nagymaros Project Case	Case Concerning the Gabcíkovo-Nagymaros Project (Hungary/ Slovakia), Judgment, 1997 I.C.J. 7.
Islamic Republic of Iran v. U.S.	Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, 2003 I.C.J. 161.
Handyside v. U.K.	Handyside v. United Kingdom, 24 ECHR (ser. A), 1976.
Thailand: Cigarettes Case	Thailand: Restrictions on Importation of and Internal Taxes on Cigarettes, Panel Report, WT/DS10/R, Oct. 5, 1990.

Plama Case	Plama Consortium Limited v. Republic of Bulgaria, Decision on Jurisdiction, ICSID Case No.ARB/03/24, Feb. 8, 2005.
Djibouti v. France	Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, 2008 I.C.J.177.

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